IN THE

Supreme Court of the United States

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..... Term, 196

[redacted] No. 1309

ANGELO A. REGINELLI,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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Miscellaneous No. ....

ANGELO A. REGINELLI,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

Petitioner, ANGELO A. REGINELLI, prays that a writ of certiorari issue to review the judgment of the Superior Court of Pennsylvania entered in the above entitled case on September 15, 1966.

OPINIONS BELOW

The memorandum opinion of the trial judgment of the Court of Quarter Sessions of Philadelphia County, Pennsylvania, is unreported and is printed in Appendix A hereto, infra, p. 24. The opinion of the Superior Court of Pennsylvania, printed in Appendix B hereto, infra, p. 31, is reported in 208 Pa. Superior Ct. 344, 222 A. 2d 605 (1966).

JURISDICTION

The judgment of the Superior Court of Pennsylvania was entered on September 15, 1966, Appendix C, p. 39, infra. A petition for allowance of appeal from the Superior Court of Pennsylvania to the Supreme Court of Pennsylvania was filed and the petition for allowance of appeal was denied per curiam by the Supreme Court of Pennsylvania on January 23, 1967. (Commonwealth of Pennsylvania vs. Angelo A. Reginelli, Petitioner, No. 55-A Miscellaneous Docket No. 15, No. 196, October Term 1966). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257(3).

QUESTIONS PRESENTED

1. In the trial of a defendant in a state court on felony charges, is it a violation of the due process clause of the Constitution to admit into evidence, expert opinion testimony not supported by adequate, sufficient, or proper reasons as required by law.

2. In the trial of a defendant in a state court on felony charges, is it a violation of due process and equal protection of the laws to admit into evidence, testimony of a drug addict, who at the time of the occurrence to which he testified, by his own admission was under the influence of an overdose of a drug which clearly would produce coma and hallucinations.

3. In the trial of a defendant in a state court on felony charges, is it in violation of due process and defendant's right to counsel to allow into evidence, the testimony of police officers and a public fire adjuster concerning statements allegedly made by the defendant under the following circumstances:

a) Defendant was arrested, taken into police custody and questioned for a period of from one to two hours, without the assistance of counsel, although he had requested that he be permitted to have counsel present, at a time prior to said questioning.

b) Defendant was questioned by the police, without being warned of his right to remain silent and that anything he said might be used against him at the trial.

c) Defendant was questioned without being advised of the nature of the crime with which he was being charged.

d) Defendant was never given an opportunity to see the recorded statements which were made by the interrogators.

4. In the trial of a defendant in a state court on felony charges, is it a violation of due process to convict the defendant when the Commonwealth offers evidence consistent with two opposing propositions, one consistent with guilt and one consistent with innocence.

CONSTITUTIONAL PROVISIONS INVOLVED

The applicable Constitutional provisions involved are:

1. Amendment VI, which reads as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in

his favor, and to have the assistance of counsel for his defense."

2. Amendment XIV, Section 1, which reads in material part as follows:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Grand Jury of Philadelphia, Pennsylvania, returned a true bill of indictment against petitioner as of December Session, 1964; No. 535, charging arson, a felony under the Penal Code of Pennsylvania, Act of June 24, 1939, P. L. 827, Section 904, 18 P.S. §4905. The petitioner filed a Petition for pre-trial discovery of the Commonwealth's evidence so as to ascertain the constitutionality of said evidence, but the petition was denied by Judge Theodore Reimel.

The petitioner went on trial before the Honorable Edward J. Griffiths, sitting without a jury, on May 11, 1965, and was adjudged guilty on the indictment of arson, on May 14, 1965. On February 3, 1966, petitioner was sentenced for a period of not less than one and one-half years, nor more than five years in the State Correctional Institution at Philadelphia, Pennsylvania. On February 8, 1966, Certiorari from the Superior Court of Pennsylvania was filed, returnable the first Monday in March, 1966, and Supersedeas Bond was allowed. On September 15, 1966, Judgment of Sentence was affirmed by the Superior Court of Pennsylvania, opinion by the Honorable Robert Lee Jacobs. A petition for the allowance of an appeal from the Superior Court of Pennsylvania was filed with the Supreme Court of Pennsylvania and without argument or opinion,

this petition was denied per curiam by the Supreme Court of Pennsylvania on February 23, 1967.

The petitioner, from November 1960 until July 1, 1961, when his store was damaged by fire, was the owner and operator of a shoe store and repair shop located in the Roosevelt Boulevard Shopping Center, Philadelphia, Pennsylvania. On the evening of the fire, petitioner closed and locked his store at some time between 8:00 P. M. and 8:30 P. M., and left the premises for his home in Collingswood, New Jersey. Later at 9:11 P. M., the Philadelphia Fire Department responded to a box alarm and arrived at the store at about 9:14 P. M. Captain L. E. Swinand of the Philadelphia Fire Department testified that upon his arrival at 9:14 P. M., the two front plate glass show windows were broken and the flames were shooting from the front of the store (N. T. 2-4). Petitioner's store was approximately 85 feet in depth, 20 feet in width, and 20 feet in height. There was also a partial partition across the store about 10 feet from the rear wall, with a doorway in the center and which extended from the floor to a point 6 to 8 feet from the ceiling, and slightly raised above the floor, and which divided the front store area from the rear repair shop containing shoe repair machinery. In the rear there was a single exit door and a single window.

On the date of the fire, petitioner had insurance coverage in the gross amount of $25,000.00, covering his merchandise, machinery, and for business interruption (N. T. 196, 235, 236). This insurance was purchased in May of 1961, some two months prior to the fire, at the suggestion of petitioner's insurance broker, who had made arrangements for the insurance several months prior to that, but could not have it written until May of 1961 because there was no way of financing the premiums on an installment basis prior to that time. It was established that there were sufficient assets on the premises at the time the insurance was written and at the time of the fire to warrant and justify the issuance of this much insurance (N. T. 276).

At or about 10:00 P. M. on the evening of the fire, the petitioner was informed of the fire by the Collingswood, New Jersey police, at which time he went immediately to his store (N. T. 203). The fire had been extinguished in about thirty minutes solely with the use of water (N. T. 4, 58). Upon his arrival at the scene, petitioner was questioned by Lieutenant Short of the Fire Marshal's office, who several days later requested that the petitioner submit to a polygraph examination, to which petitioner submitted, but the results of the test were not introduced in evidence by the Commonwealth (N. T. 55).

On the evening of the fire, after being questioned by Lieutenant Short, petitioner was approached by approximately a half dozen fire insurance adjusters who solicited him as a client, one of whom was from the office of Jack Feinstein, public adjuster (N. T. 205). On July 5, 1961, petitioner agreed to have Jack Feinstein represent him in the settling of his claims arising out of the fire, and was advanced the sum of $2,000.00 by Jack Feinstein (N. T. 206). Petitioner denied having previously known Mr. Feinstein or anyone connected with his office. A compromise settlement in the amount of $16,000.00 was made with the various fire insurance companies insuring the contents (N. T. 216). There was no evidence presented at the trial that any of the assets were removed prior to the fire, or that there was any attempt to remove these assets prior to the fire or to defraud the insurance companies in any way.

There was admitted into evidence against petitioner at his trial, testimony of Edward Klayman who testified to an occurrence and conversation which he allegedly overheard between petitioner and one Norman Prussell who died prior to petitioner's trial. The witness stated that this conversation took place after the fire and that petitioner was apprehensive and expressed concern since the Fire Marshal's office had questioned him. He testified that he, Norman Prussell, and the petitioner then met with one Herbert Price. He further testified that the three of them

then went to obtain $2,000.00 from Stanley Feinstein, a fire insurance adjuster, and that Prussell, Price and the petitioner divided this sum equally between them. He testified that Price assured the petitioner that he should not worry as he, Price, was a professional (N. T. 104-117). The Court then elicited that both Klayman and Price were drug addicts at the time of the alleged meeting about which Klayman testified (N. T. 117).

On cross-examination of this witness, it was elicited that Edward Klayman was under indictment for the use of narcotics and probation violation, fraud in obtaining narcotics, the use of narcotics, and had been previously convicted of the use of narcotics on at least three occasions, and for carrying a concealed deadly weapon in his motor vehicle. Also at this time, Edward Klayman was under indictment on three counts of arson dating from July 1961 to March 1963. The witness testified that he had been taking a synthetic narcotic, Dolophine, for a period of at least four months prior to his witnessing the alleged conversation between Prussell, Price and the petitioner. He admitted that he had taken two Dolophine tablets the morning he allegedly heard the conversation which took place (N. T. 129). Evidence was introduced at the time of trial in the form of medical literature which was agreed to by all counsel to be tantamount to the testimony of a doctor, if he were called to testify, concerning the effect of the tablets. The following was read into evidence:

> ". . . And with respect to this particular drug, it says that for very severe pain a dosage of ten mg. every four to six hours as needed.
>
> "Now, that is one 10 mg. And further it states that the side effects overdosage are as follows: Depression, and also the following symptoms: Drowsiness, sweating, mental depression, delirium, hallucinations, circulatory collapse, and coma." (N. T. 305) Physicians' Desk Reference Book 693 (18th Edition).

One tablet would be a normal dosage; two tablets would be an overdosage. On cross-examination this witness testified that his recollection concerning the occurrence and conversation about which he testified was a bit hazy. That he could not remember any other events of the day other than this meeting and conversation (N. T. 134). At the time of this trial, he admitted he had been given phenobarbital. He also stated that he had been given Librium, a tranquilizer, for the five weeks preceding the trial, while he was a prisoner at the City Detention Center, and that prior to that he was given Thorazine. These medications had been prescribed by a psychiatrist at the City of Philadelphia Detention Center and given with the approval and consent of the District Attorney's office. On the day before and on the morning of this trial, Edward Klayman admitted also that he was receiving cold capsules containing Diphensydramine in addition to the other medications mentioned (N. T. 139). Finally, at the conclusion of the testimony of this witness, he admitted quite readily that he often responded to the nickname, "Psycho" (N. T. 158).

It was further elicited from this witness on cross-examination that he testified at a City of Philadelphia magistrate's hearing in July of 1964 concerning the witnessing of the meeting and conversation above described, and that at the time he testified before the magistrate he did not mention in any way the petitioner's implication or presence at the incriminating meeting. In fact, he even failed to mention the petitioner's name at the time he testified to this alleged meeting and conversation (N. T. 166-174).

Petitioner made a proper and timely motion that the testimony of Edward Klayman be stricken on the grounds that he had been a drug addict for many years; that he had been convicted three times for drug addiction; and at the time of the incident to which he testified, he had been on drugs for a sustained period of at least four and a half months. Prior to the occurrence to which he testified and on

the day of the occurrence, he was admittedly under the influence of an overdose of drugs, and on the day that he testified, he admitted that he was under the influence of drugs (N. T. 136, 139). Petitioner moved at the conclusion of this testimony to have the Court rule this witness incompetent as a matter of law. The trial Judge denied the motion, stating as his reasons therefor that even an insane witness is not incompetent at law, and that the condition of this witness went only to the weight to be given to his testimony (N. T. 398). The court erred in so ruling.

Three years after the fire, on July 14, 1964, petitioner was arrested in Allentown, Pennsylvania, and taken to Philadelphia on July 15, 1964, arriving there at about 3:00 P. M. Petitioner was then questioned extensively by Lieutenant William Frith, Detective Matthews and Lieutenant Aleszczyk of the Fire Marshal's office.

Prior to this questioning, which lasted approximately two and a half hours, petitioner was not advised that he was being charged with the crime of arson or any crime whatsoever, in spite of his query as to why he was apprehended and arrested and being held by the police. He was not warned or advised at any time of his right to remain silent, and further that anything that he might say during the course of the interrogation could later be used at a trial against him. Also prior to this questioning, petitioner advised the interrogating officers that he had a personal attorney whom the officers knew, and that he wished to confer with his attorney, and requested that he be permitted to contact his attorney. Petitioner's request to confer with his attorney was refused until the questioning was completed (N. T. 221, 315). Notes of this testimony were taken unofficially by Detective Matthews and were incorporated into his report (N. T. 317).

"Q. Now, do you have any record of the questions that you asked Mr. Reginelli?

A. No written record.

Q. Do you have any record of the answers that he gave you?

A. Just my memory, sir." (N. T. 317)

After this session of questioning, Edward Klayman was brought in to confront the petitioner. Lieutenant Frith testified that while Klayman was present, he asked petitioner:

"You did state that you did go to the Lafayette Building in the company of Prussell and Klayman."

Lieutenant Frith then testified that petitioner responded that he was confused (N. T. 324).

Also entered into evidence, over the petitioner's objection, was the testimony of Wilmer Boardman, special agent of the National Board of Fire Underwriters. This witness testified that he was present at the aforementioned questioning of the petitioner, and that petitioner stated that he had met Heshy Price at Feinstein's office after the fire (N. T. 338). Boardman also testified that petitioner admitted at this interrogation that on the day he picked up the $2,000.00 he met Norman Prussell and they went to Edward Klayman's apartment and then picked up Heshy Price and went to Fifth and Chestnut where the $2,000.00 was divided (N. T. 339).

The above evidence by Lieutenant Frith and Wilmer Boardman was introduced by the Commonwealth under the guise of rebuttal testimony. On direct examination, Edward Klayman testified that he had met the petitioner along with Prussell and Price shortly after the fire and that he observed them divide the $2,000.00 (N. T. 104-174).

This was introduced as evidence that the petitioner had conspired with Prussell and Price to commit arson. Petitioner on direct examination then testified that he was alone when he received the $2,000.00 from Feinstein (N. T. 210, 211). Petitioner also testified that he had not known nor had he seen Edward Klayman until he was arrested and confronted by this witness on July 15, 1961 (N. T. 211).

Motion to strike the testimony of Lieutenant Frith, Wilmer Boardman and Detective Matthews, on the ground that it was obtained in violation of petitioner's constitutional rights, was made prior to the submission of the case to the judge for his decision. The motion was denied by the court on the basis that such questioning was done during the investigatory stage and that it was not at the critical point in the procedure (N. T. 393). In denying this motion, the trial judge erred.

The court admitted into evidence, over petitioner's objection (N. T. 51) and motion to strike (N. T. 399), the expert opinion testimony of Lieutenant Pernell Short of the Fire Marshal's office. This witness testified that he arrived at petitioner's store at about 9:40 P. M. on the evening of the fire, which was 26 minutes after the fire department had reached the scene in response to an alarm. From his investigation, he testified that from the circumstantial evidence it was his expert opinion that this fire was incendiary in nature rather than accidental (N. T. 52). No direct evidence of any kind to support this opinion was entered. The circumstantial evidence elicited on direct examination which he used to support this opinion is as follows: (1) There was a torching effect of the fire which was evidenced by smoke and fire damage to the exterior front of petitioner's store, from which he concluded that said torching was caused by a severe and rapid burning fire (N. T. 33, 50); (2) There were two separate fires, not physically connected, one in the front of the store and one in the back, separated by a partition which he stated was from floor to ceiling, with only a door in the middle (N. T. 35, 39, 40); (3) That a flammable liquid had been ignited at both sites as evidenced by the irregular pattern of charring on the asphalt floor (N. T. 36), and that one fire burned underneath from one side of a counter to the other (N. T. 41, 42).

On cross-examination, Lieutenant Short substantiated petitioner's testimony, that there were various shoe dyes, waxes, lacquers, polishes, cleaning fluids, alcohol, glues, and other inflammatory materials on the premises in addi-

tion to such items as shoes, sneakers, galoshes, rubbers, and other footwear. All these items were necessary materials in petitioner's business and none of the inflammatory items were found in any inordinate amounts or locations. In fact, there was no direct evidence of any kind that any foreign agents were introduced to the premises to either ignite a fire or to speed it along in its burning as would be the case of a fire that was set by human hand (N. T. 59). Lieutenant Short admitted that the inflammatory items used in this business had ignition points as low as minus 45 degrees and went as high as 400 degrees Fahrenheit (N. T. 69). Also brought out on cross-examination was the fact that two fires which were described by Lieutenant Short were not physically isolated as he stated in direct testimony. This was established by the introduction of photographs of the premises into evidence which established that the partition dividing the petitioner's store from his repair shop did not extend completely from the floor to the ceiling as Lieutenant Short wanted the court to believe, and that there were openings in the partition in the form of a door and a display window, and further that the partition did not butt tightly against the bottom of the tile floor but had a space in between under which fluids would flow. Lieutenant Short admitted that the condition of the partition was not as he described in direct examination. This evidence established that scorching in the rear of the store could have been caused by sparks coming from the front of the store either through the opening of the door, through the display window, under the partition, and above the partition since it only extended to a point 6 to 8 feet from the ceiling (N. T. 66, 68). The evidence of the second fire in the back of the store consisted of a scorching of the tile at the back of the partition in the center of the store and being the size of one foot in diameter.

A motion was made by petitioner for a directed verdict based upon the following reasons: (1) The Commonwealth failed to produce any direct evidence that the fire was incendiary in origin; (2) The circumstantial evidence upon which

Lieutenant Short based his opinion fell far short, as a matter of law, of being good and adequate so as to be sufficient reason for said opinion. As a result, petitioner submitted that the Commonwealth had not made out with sufficient weight and clarity the fact that the fire was incendiary in origin as distinguished from accidental (N. T. 410).

Petitioner then made a motion for a mistrial on all the grounds raised since said evidence was either illegally and improperly obtained or improperly and erroneously admitted. This motion was refused on the ground that the judge had previously ruled upon this evidence and had held it to be admissible (N. T. 411).

REASONS FOR GRANTING THE WRIT

1. *Admissibility of Expert Opinion Evidence*

In an arson case the corpus delicti consists of a wilful and malicious burning, that is, a fire of incendiary origin. *Commonwealth v. Nasuti*, 385 Pa. 436 (1956). In petitioner's case, the Commonwealth presented Lieutenant Short of the Fire Department who testified that the fire was, in his expert opinion, incendiary in origin. His opinion was based upon the following circumstances:

a) The fire was severe and rapid burning and the glass panels in the front had been blown out, with scorching to the front exterior of the building.

b) There were two separate fires not physically connected.

c) There were indications that inflammable liquid had burned (N. T. 35, 39, 40).

On cross-examination of this witness, it was established that the supplies which were necessary in petitioner's business consisted of shoe dyes with an alcohol base, waxes, lacquers, polishes, alcohol, glues and cleaning fluids, all in-

flammable, plus rubber and canvas sneakers and galoshes, which would cause a severe and rapid burning fire (N. T. 59, 69). This witness also testified that these materials and supplies did in fact burn, and there was no evidence produced to show that they were not incidental and customary to petitioner's business, nor that they were placed so as to cause or accelerate the fire.

Also on cross-examination of this witness, it was established that the two fires were not physically separated, but that on the contrary, one could have been the source of the other (N. T. 66-68).

In *Commonwealth v. Nasuti*, 180 Pa. Super. 279, 385 Pa. 436 (1956), at 180 Pa. Super. 283, the court stated:

> "As to whether opinion evidence, expert or otherwise, is admissible on the question of the incendiary origin of a fire, the courts in general are hopelessly in conflict. Cf. 131 A.L.R. 1113, 1125 and particularly 1135, et seq. In 2 Wharton, Criminal Evidence, 12th ed. §517, it is said: 'In an arson case, a witness cannot, as a general rule, testify concerning his opinion as to whether the fire was or was not of incendiary origin, that being a question for the jury to determine, and upon which they can usually form their own opinion without any need of expert advice.' "

However, the court recognized that such expert opinion would be admissible ". . . when the opinion together with the reasons will afford the jury assistance, in addition to an explanation of the facts, in determining that issue and the question whether the fire was set shortly before an alarm."

In *Commonwealth v. Greenberg*, 143 Pa. Super. 203, 17 A.2d 698, the court refused to admit an expert's opinion and declared ". . . that the explanation of the cause of burning in particular locations or spots in a building is not a matter for expert testimony, but for the jury exclusively."

In order for such a witness to give an opinion, he must support his inference with sufficient and adequate evidence,

especially where such evidence is circumstantial. Lieutenant Short based his inference upon facts which were already before the court: (1) That shoe stores normally contain inflammable liquids; (2) That canvas, rubber and leather goods in cardboard boxes plus inflammable liquids will cause a fire to burn severely and rapidly; (3) That there were two separate fires, a fact which was already before the court and from which the court would have been able to draw its own conclusions. *Commonwealth v. Greenberg*, supra.

It is submitted that Lieutenant Short's opinion was not based upon adequate and sufficient facts, and did not involve explanations and inferences not within the range of ordinary training, knowledge, intelligence and experience. *Commonwealth v. Nasuti*, 385 Pa. 436, at 443 (1956). Further, that the court's capricious disregard of the controlling law was a violation of petitioner's right to due process and equal protection under the laws.

2. *Trial Court's Abuse of Discretion in Not Declaring a Witness Incompetent*

The Commonwealth adduced no direct evidence against the petitioner, and the major portion of the circumstantial evidence which was presented was the testimony of Edward Klayman (N. T. 129-174). On cross-examination, this witness admitted his addiction to narcotics for a number of years prior to July 1961; that he was taking drugs at the time he was a witness to the alleged incriminating occurrence and conversation (N. T. 129), and that he was also taking drugs at the time of his testimony (N. T. 136-139). Further evidence was adduced on cross-examination to the effect that this witness's recollection of the occurrence and conversation and especially the circumstances surrounding the same was hazy (N. T. 134, 149, 150), and that he failed to implicate the petitioner in his testimony at a magistrate's hearing concerning this matter (N. T. 174). It is also to be noted that Edward Klayman, at the time of his testimony,

was awaiting trial on charges of fraud in obtaining narcotics, use of narcotics, false pretenses in obtaining narcotics, three charges of arson, and was also faced with a contempt citation and a probation violation (N. T. 119, 120).

This witness admitted that he had previously given the police information concerning other crimes in an effort to have them go easy on him (N. T. 154). In *Lemons v. U. S.*, 39 F.2d 761, at 764, the court, although permitting such a witness to testify against one who had allegedly sold him narcotics, stated that it did not commend the state in proving its case by the use of such a witness, since the possibility of his being biased is great.

It is petitioner's contention that this witness's testimony should have been stricken as he was incompetent to testify, not merely because he was addicted to narcotics, but that in light of the surrounding circumstances and the fact that his testimony was uncorroborated, the court should have ruled him incompetent as a matter of law, and that the above stated circumstances were not merely to be used as a weight in determining this witness's credibility.

The law in this area is not settled, but petitioner contends that as a general principle, narcotic addiction, like forms of insanity, affects credibility. However, it is within the sound discretion of the trial court to consider the surrounding circumstances and it may then declare a narcotics addict incompetent.

In *State v. Fong Loon*, 29 Idaho 248, 158 P. 233 (1916) at 237, the court stated the law to be applied as to declaring such testimony inadmissible and cited 1 Rice on Evidence, p. 625.

> "Excessive use of opium may be always shown as tending to impair the credibility of a witness, but it is not ground for the exclusion of his testimony until it satisfactorily appears that he was under its influence when examined or when he states a certain fact to have occurred and attempts a narration of the occurrence."

Generally, any person offered as a witness is presumed competent to testify if he appears to be of sufficient age and mental capacity, unless he is expressly excluded by some statute or rule of law. 97 Corpus Juris, Secs. 49-50.

There are four elements which must be present in the witness for him to be competent. They are as follows:

1. Comprehension of the obligation to tell the truth.

2. The witness must have an opportunity and the ability to observe and must have the physical and mental ability to perceive what he sees or hears.

3. He must have the ability to remember what he sees and hears.

4. He must have the ability to relate what he sees and hears.

The witness is presumed to possess these elements affecting organic or emotional capacity and it is the objecting party who usually has the burden of rebutting this presumption. However, there are several instances in which the presumption of competency may be lost and not available to the witness. 2 Wigmore on Evidence, Secs. 484 and 485. These instances are cases of idiocy, insanity, intoxication or infancy.

It is the court's duty to initially pass on the competency of a witness and, thereafter, the jury's duty to pass on the credibility of the testimony and give it whatever weight they feel it is entitled to. Drug addiction, as such, does not affect competency, but does affect credibility. *Commonwealth v. Farrell*, 319 Pa. 441.

It is clear on the face of the record that there is no dispute on the evidence that was established concerning the witness's condition at the time of the occurrence to which he testified, and his condition at the time of the conversations that he heard, that he was under the influence of drugs. The witness's condition was caused by the side effects from the drugs and would have clearly affected his ability

to comprehend his obligation to tell the truth, would have affected his opportunity and ability to perceive what he saw or heard, and must have certainly affected his ability to remember and record and later relate what he saw or heard. Furthermore, at the time he testified he was admittedly under the influence of drugs which would have affected all the elements necessary to make him a competent witness. The court erred in ruling that this witness was competent under the circumstances and in permitting this testimony to be considered on the question of the amount of weight to be given it. It has never been contended by the petitioner that drug addiction as such makes a witness incompetent. The trial court and appellate court both recognized this fact, but neither the trial judge nor the appellate court understood or approached the problem or answered the question of whether or not a witness under the influence of drugs sufficient to distort the witness's mind, memory and testimony would make such a witness incompetent as a matter of law.

In *People v. Hines*, 30 Ill. 2d 152, 195 N.E. 2d 712 at 714, the court admitted the testimony of such a witness, but qualified such admission to situations where such testimony could be held sufficient under the surrounding circumstances. This court cited *People v. Norman*, 28 Ill. 2d 77, 190 N.E. 2d 819, which required corroborating evidence to support the testimony of such a witness. In both *People v. Hines*, supra, and *People v. Norman*, supra, the corroborating evidence was in the form of a marked bill found upon the person of the defendant, and the testimony of a police officer.

It is submitted that the trial court in admitting the testimony of Edward Klayman in which he narrated an occurrence which represented the major portion of the Commonwealth's circumstantial evidence and which was in its totality uncorroborated, capriciously disregarded the evidence of the surrounding circumstances and abused its discretion. As a result, petitioner was denied due process and equal protection under the law.

3. *Commonwealth's Failure to Meet Its Burden of Proof*

In *Commonwealth v. Nasuti*, 385 Pa. 436 at 445 (1956), the court stated:

> "All that is required is that, the evidence being circumstantial, the circumstances proved should be such as reasonably and naturally to justify an inference of guilt of the accused, and of such volume and quality as to overcome the presumption of innocence and satisfy the jury of the accused's guilt beyond a reasonable doubt."

For a conviction in an arson case three facts must be established: (1) that there was a fire; (2) that it was of incendiary in origin; (3) that the defendant was the guilty party.

It is admitted that there was a fire, but petitioner submits that the Commonwealth failed to prove beyond reasonable doubt that the fire was of incendiary origin or that he was the guilty party. The only evidence as to the incendiary origin of the fire was the testimony of Lieutenant Short, which under the circumstances, if admissible at all, was of the lowest quality. Further, the only evidence as to the petitioner being the guilty party was the testimony of Edward Klayman, which was not only of questionable competence, but which was also subject to bias.

In *Pauli v. Commonwealth*, 89 Pa. 432, the court stated in essence that it is not necessary for the jury in order to acquit a defendant to (1) find a theory that conclusively establishes his innocence; (2) there is no doubt that in favor of liberty of the citizen, the court may and in a proper case, should declare the evidence insufficient to convict.

In *Commonwealth v. New*, 354 Pa. 188 at 221 (1946), the court stated:

> "When a party on whom rests the burden of proof in either a criminal or a civil case, offers evidence consistent with two opposing propositions, he proves neither."

In the argument of petitioner's demurrer as to Lieutenant Short's testimony, the court in essence admitted that one could infer from this witness's cross-examination, that the fire was accidental in nature (N. T. 178). The court responded with the question, "Could it be other than that?" meaning could the fire have been other than accidental, to which petitioner's attorney responded, "Yes".

Thus, from the testimony of Lieutenant Short, the court conceded that there was circumstantial proof that the fire could have been accidental or it could have been incendiary (N. T. 179). On this basis alone, the court should have allowed the demurrer and declared the evidence insufficient to convict; and its refusal to do so was a violation of petitioner's right to due process and equal protection under the laws.

4. *Admission into Evidence of Incriminating Statements Unconstitutionally Obtained*

In *Escobedo v. Illinois*, 378 U. S. 478, 490, 491, 84 S. Ct. 1758, it was stated:

> " 'We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the assistance of counsel' in violation of the Sixth Amendment to the Constitution as made obligatory upon the States by the Fourteenth Amendment,' *Gideon v. Wainwright*, 372 U. S. at 342, 9 L ed 2d at 804, 93 ALR 2d 733, and that no statement elicited by the police during

the interrogation may be used against him at a criminal trial.' ".

The petitioner in the instant case was arrested and taken into police custody. At no time prior to his interrogation was he advised of the nature of the offense with which he was being charged, in spite of his request, nor was he advised of his right to remain silent or that his statements might be used against him. Also prior to this interrogation, the police were aware of the fact that petitioner had an attorney and that petitioner had requested to confer with his attorney. As a result of this questioning, incriminating statements were elicited in which petitioner allegedly admitted knowing and having met with Prussell and Price, both of whom were known arsonists. Said testimony provided the Commonwealth with evidence to the effect that the petitioner along with Price and Prussell had conspired to commit the crime of arson, and that petitioner had paid his co-conspirators for either services or information as to how to commit arson.

In deciding this issue, the Superior Court stated that, "The testimony as to whether or when appellant requested counsel and whether or when he was advised of his right to have counsel during the questioning is very unclear and conflicting." *Commonwealth v. Reginelli*, 208 Pa. Super. 344, 352-353, n.1, 222 A.2d 605 (1966).

To avoid deciding this issue under the rule of *Escobedo v. Illinois*, 378 U. S. 478, the Superior Court held that *Walder v. United States*, 347 U. S. 62, 74 S. Ct. 354 (1954) was controlling which set forth the circumstances under which the prosecution may make use of unlawfully obtained evidence to impeach a defendant's credibility after he opens the door on direct examination by making assertions which go beyond denial of complicity in the crime charged. This court cited *Commonwealth v. Wright*, 415 Pa. 55, 202 A.2d 79 (1964), which set forth the following: "(1) The defendant must elect to take the stand; (2) His testi-

mony which conflicts with the illegally secured evidence must do more than deny the elements of the crime for which he is being tried; (3) The inadmissible evidence should be received only to the extent that it does not admit the very acts which are essential elements of the crime charged: *Walder v. United States*, supra." *Commonwealth v. Wright*, supra at p. 60, and that all these conditions were met in petitioner's case.

Preliminarily, it must be noted that both *Walder v. United States*, supra, and *Commonwealth v. Wright* considered illegal search and seizure and that since both of these cases were decided prior to *Escobedo v. Illinois*, it is highly questionable as to whether these cases should apply to illegally obtained testimony. Furthermore, the Commonwealth opened the door with the testimony of Edward Klayman who allegedly witnessed the consummation of a conspiracy involving the petitioner, Price and Prussell, and the petitioner was forced to come forth to deny by his own testimony that he had any such relationship with either man and that he had never seen or known Klayman prior to his arrest, especially since the trial judge denied motion for directed verdict.

Therefore, petitioner's testimony was merely a denial of his complicity in the crime charged and the admission of said illegally obtained evidence did in fact admit the very acts which were essential elements of the crime charged. This is especially true since the Commonwealth offered no direct evidence of petitioner's perpetration of arson, but based its case solely on circumstantial evidence. This evidence was obtained in violation of petitioner's right to counsel as guaranteed under the Sixth Amendment, which is made obligatory upon the States by the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF OYER AND TERMINER, GENERAL JAIL DELIVERY AND QUARTER SESSIONS OF THE PEACE IN AND FOR THE CITY AND COUNTY OF PHILADELPHIA

December Sessions, 1964

No. 534—Arson No. 535—Arson

COMMONWEALTH OF PENNSYLVANIA

v.

HERBERT PRICE AND ANGELO A. REGINELLI

OPINION SUR SUPERIOR COURT RULE No. 46

GRIFFITHS, J. March 17th, 1966

The two above-named defendants were tried before the undersigned without a jury on bills of indictment charging arson. Both were found guity, motions in arrest of judgment and for a new trial were denied, and the defendants have been sentenced.

The facts briefly are as follows:

On July 1, 1961, at about 9:00 P. M. fire occurred at the one-story shoe repair and retail shoe store operated by the defendant, Angelo A. Reginelli, located at 6545 Roosevelt Boulevard, Philadelphia. At the trial Lieutenant Short, of the Fire Department, testifying as an expert, stated that the fire was of incendiary origin because: 1) the fire consisted of a severe rapid burning, in the front of the building, the glass panels in the windows having been blown out; 2) a second fire in the rear of the building, not physically connected with the first, was a low burn fire which could not burn at this level accidentally; and 3) the fact that he found evidence of blistering of the tile in an irregular burning pattern, indicating the presence of inflammable liquid.

The case against defendant Reginelli was based on the fact that he was the owner of the store and had left the premises less than an hour before the fire. It was established that he was $950 in rent arrearages at the time of the fire, and that a constable had distrained on his property three days before the fire. His insurance coverage has been increased on May 24, 1961, five weeks before the fire from $6,000 to $31,000. This evidence indicated a possible motive for the crime.

One Edward Klayman, an ex-convict and narcotics addict, testified that a few days after the fire he was in the company of one Norman Prussell (now deceased) and the defendants, and overheard conversations in which Prussell and the defendant Price admitted setting fire to the store, at defendant's Reginelli request. The latter three went to the office of the fire insurance adjuster where the three received and equally divided $2000.

Specifically, according to Klayman, before they picked up Price, Reginelli indicated that he was worried over questioning by the Fire Marshal's office and was told by Prussell not to worry, because this was "not the first time we have done these things. And we know what we're doing."

Klayman testified to a second conversation which he said took place after Prussell, Reginelli and Price returned to the automobile after picking up the money and Price said, "I get more than this, don't I? I'm not going to settle for this." Prussell's reply was to assure him that he would receive more and that they would "do very well in this".

While, according to Klayman, the money was being divided a third conversation took place in which Reginelli complained and expressed worry because he was short of money and out of a job and was again reassured by Prussell who informed him that he would receive "plenty of money". At that time, according to Klayman, Price stated:

> "Don't worry about the Fire Marshal's office. And don't worry about the police. We're professionals. We know what we're doing . . . I once purchased a prop-

erty that there was back taxes against, and this was an untenanted property, I bought, insured, and filled it with furniture in one week. And before there was any water, gas, electricity turned on, that place went up in smoke. And the Fire Marshal's office said you will never get away with this; you will never get paid, and you are going to get locked up . . . I got my money. There was no trouble. If I could get away with something like that, you have nothing to worry about. You don't have to think about the prosecution. They don't know what's in your mind. You are insured for arson. But we are professionals. We know what we use, and it's undetectable, believe me."

Each defendant took the stand and denied the charges. The Court, sitting as a jury, found both guilty.

Relative to the motions in arrest of judgment, "the effect of such motion is to admit all the facts which the Commonwealth's evidence tends to prove": *Com. v. Tabb*, 417 Pa. 13, 16 (1965). Drawing all reasonable inferences from the testimony which will support the verdict, we find no basis for sustaining a motion in arrest of judgment. *Com. v. Wright*, 383 Pa. 532 (1956); *Com. v. Ornato*, 191 Super. 581 (1960) aff'd 400 Pa. 626, cert. den. 364 364 U. S. 912.

In regard to the motion for a new trial, defendants lay great stress upon the fact the witness Klayman was himself a convict and a drug addict. Counsel for defendants are so adamant in their assertions in this regard, that one would almost think the law were that the defendants could cause such testimony to be excluded as a matter of right. They apparently overlook the fact that, while such testimony, coming from a corrupt and polluted source, must be scrutinized with care, and accepted with caution, it nevertheless is admissible, and, if believed, after such scrutiny, may be relied upon to convict. Conviction of a crime, even though punishable by death, does not render a person incompetent as a witness except where the conviction is for

perjury or subornation of perjury. *Com. v. Clemmer*, 190 Pa. 202, 220 (1899). Drug addiction, as such, does not go to admissibility, but to credibility. *Com. v. Farrell*, 319 Pa. 441 (1935). Thus, we cannot categorize drug addiction as an automatic disqualifying trait. The question must be, did such, in fact, impair his ability to observe, to remember or to relate. *Katleman v. State*, 104 Neb. 62 (1919); *Kelly v. Maryland Casualty Co.*, 45 Fed. 2nd 782, 788 (Dist. Ct. W. D. Va. 1929, and 4th Circuit, (1930); *State v. Gleim*, 17 Mont. 17 (1895). In no way condoning the habit, we note that Pescor states that, under certain circumstances, a drug addict "can live the life of a respectable, honored citizen." Michael Pescor, in V. C. Branham and S. B. Kutach (eds), *Encyclopedia of Criminology* (N. Y. Philosophical Library, 1949), p. 132.

Suffice it to conclude, in this regard, that the Court, sitting as a jury, accepted the testimony of Klayman and acted upon it, being satisfied beyond a reasonable doubt.

Defendant's next contention pertains to the testimony of the Commonwealth's expert, Lt. Short, as to the incendiary origin of the fire. The nature of this testimony is described above. There is no clearly defined rule as to what constitutes an expert. Com. v. Gibbons, 3 Super. 408, 411 (1897). He is usually one who is experienced, trained or skilled in some particular business or subject, and who, by reason of such knowledge, is better qualified to speak on the subject than witnesses who have made no special study of it. *Struthers v. Phila. & D. C. R.R.*, 174 Pa. 291, 298 (1896); *McCullough v. Holland Furnace Co.*, 293 Pa. 45, 49 (1928). The proper office of the expert is to instruct the court and jury in matters so far removed from the ordinary pursuits of life that accurate knowledge can be acquired only by special study or experience. *Coyle v. Com.*, 104 Pa. 117, 131 (1884); *Com. v. Farrell*, 187 Pa. 408, 419 (1898); *Com. v. Fugmann*, 330 Pa. 4, 26 (1938).

In *Com. v. Nasuti*, 385 Pa. 436, at p. 433, the Court said:

". . . Expert testimony is admissible in all cases, civil and criminal alike, when it involves explanations and inferences not within the range of ordinary training, knowledge, intelligence and experience. Certainly laymen could hardly be expected to have knowledge in regard to various types of fires and the differences in the nature, violence and intensity of flames resulting from the burning of inflammable liquids or other materials as contrasted with the burning of a wooden counter or hair upholstery differences in the rapidity of such fires, sufficiency of the heat generated to cause the cave-in of a bulk window, the fact that where inflammable liquids are consumed or being burnt their presence cannot be detected by the sense of smell. Indeed, the very absence of any trace of inflammable liquids on the premises, which was one of the main points relied on by defendant, amply justified the introduction of expert testimony to establish that this did not overcome the significance of the other indications of the incendiary origin of the fire. In short, while in some arson cases the testimony may not need any supplementation by expert opinion, other such cases clearly justify its admission."

Lt. Short, by reason of his special study and experience, furnished the Court, and the Court, sitting as a jury, with knowledge of which the Court was not possessed. Based on such testimony the Court was able to draw certain necessary and essential inferences.

It is well settled in Pennsylvania that the corpus delicti in arson cases may be shown by circumstantial evidence. *Com. v. Smith*, 111 Super. 363 (1934); *Com. v. Vore*, 155 Super. 143 (1944); 18 P. S. 4905.

In 1949 your Honorable Court held, in a case involving a prosecution for arson, a burning with intent to defraud an insurer—*Com. v. Margie*, 165 Super. 84, 88:

> "It was not incumbent upon the Commonwealth to produce direct evidence that defendant started the fire; it was required to show circumstances reasonably and naturally warranting an inference of guilt and of such 'volume and quality as to overcome the presumption of innocence and satisfy the jury of the accused's guilt beyond a reasonable doubt': *Commonwealth v. Marino*, 142 Pa. Superior Ct. 327, 334, 16 A. 2d 314."

Defendant Reginelli has argued that, at the time of his interrogation by the police, he was not afforded certain constitutional safeguards. The testimony in this regard was conflicting in part. The Court, sitting both as Court and jury, found that the defendant was informed of his rights and intelligently waived them. In this respect we recall the apt words of Mr. Chief Justice Bell, in *Com. v. Melton*, 406 Pa. 343, at p. 352 (1962):

> "Defendant, like most defendants, proceeds on the assumption that you must believe all of his statements or confessions; of course, this is erroneous, a jury can believe all or a part of or none of a defendant's statements, confessions or testimony. . . . A jury or trial court can similarly believe all or a part or none of the testimony of any witness. . . ."

Finally, defendant Price argues that the court showed prejudice in stating as part of its reasons for adjudicating the defendant guilty the following:

> "Relating to Price, the Court noted that he had a consistent answer for many questions, 'No, sir'. That was his pattern of answers. The Court also observed that his legs were shaking most of the time when he was testifying. He was very nervous on the witness stand, which, in itself is not indicative of guilt, but should be taken with other circumstances.

"The Court observed that Price apparently was making efforts at hedging, making very fine distinctions in his own mind, which he kept hidden unless he was closely interrogated."

What counsel overlooks in this regard is that when the Court made these observations it was functioning as a jury, expressing some of the reasons why the jury did not believe the testimony of Price. At the conclusion of its deliberation the Court, as a jury, was convinced beyond a reasonable doubt of the guilt of the defendant.

The Court, here sitting as a jury, had the responsibility of telling who was and who was not telling the truth. As such, we observed the manner of testifying, demeanor on the witness stand, and all other facets which we employ in ordinary life to ascertain veracity. *Fullam v. Rose*, 160 Pa. 47, 55 (1894); *Evans v. Penn Mutual Ins. Co.*, 322 Pa. 547, 557 (1936), and cases cited in footnote. Nothing in the comment was prejudicial. In fact, such comment even negated prejudice relating to nervousness.

As a court, the Judge may comment on matters affecting the credibility of witnesses, (and this defendant Price was a witness, although a defendant), where circumstances warrant it, and in some cases it may even be his duty to do so. *Com. v. Cunningham*, 232 Pa. 609, 611 (1911); *Com. v. Pursel*, 110 Super. 110, 115 (1933); *Com. v. Wiswesser*, 124 Super. 251, 259 (1937).

If it is valid for a judge to comment thus as a judge, it certainly is equally valid, if not more so, for the judge to so comment in speaking as a jury.

For the foregoing reasons we denied the Motions in Arrest of Judgment and for a New Trial.

By the Court,

/s/ GRIFFITHS, *J.*

APPENDIX B

IN THE SUPERIOR COURT OF PENNSYLVANIA

Philadelphia District

No. 196 October Term, 1966

COMMONWEALTH OF PENNSYLVANIA

v.

ANGELO A. REGINELLI, *Appellant*

Appeal from the Judgment of Sentence of the Court of Oyer and Terminer and Quarter Sessions of the Peace, Philadelphia County, No. 535 December Sessions, 1964.

Opinion by JACOBS, J. Filed: September 15, 1966

Angelo A. Reginelli and Herbert Price were found guilty of arson after their cases were consolidated for trial before the Hon. Edward J. GRIFFITHS, sitting without a jury. Each appeals from the sentence imposed after his motions in arrest of judgment and for a new trial were overruled. This opinion decides Reginelli's appeal; Price's appeal is the subject of a separate opinion filed today, Commonwealth v. Price, 208 Pa. Superior Ct. 354, A.2d (1966).

At about 9 p.m. on Saturday, July 1, 1961, a fire occurred in Reginelli's shoe repair shop and leather goods store, located at 6545 Roosevelt Boulevard, Philadelphia, Pennsylvania. Reginelli had locked up the store between 8 and 8:30 p.m. and left the premises. At the trial, Lieutenant Purnell B. Short, a member of the Philadelphia Fire Department for eighteen years and an investigator for the Philadelphia Fire Marshal's office for five years, investigating about 500 fires each year, testified that it was his opinion that the fire was incendiary in origin. The Commonwealth also presented evidence that on May 24, 1961, about five weeks before the fire, Reginelli had caused the

insurance on the contents of his store to be increased from $6,000 to $31,000, and that on June 28, 1961, three days before the fire, a distraint for rent in the amount of $950 had been issued against him.

A Commonwealth witness, Edward Klayman, then testified that he was introduced to Reginelli in the early part of July, 1961 by a friend, Norman Prussell, who subsequently died in 1963. On that date Klayman overheard a conversation in which Reginelli told Prussell that he had been questioned by the Fire Marshal's office and that he was very worried about the view they took concerning the fire. Klayman said that he then drove Prussell and Reginelli to meet Price at a luncheonette near the Einstein Medical Center on Fifth Street. According to Klayman the four proceeded to Fifth and Chestnut Streets, at which point Reginelli, Price and Prussell left the automobile and came back within ten or fifteen minutes. After returning to the car, the two appellants and Prussell divided the sum of $2,000 among themselves. According to Klayman, Reginelli was upset and said: ". . . now I don't have my business, I don't have a job, and I'm having trouble with my wife. The Fire Marshals are bothering me." Appellant Price then said to Reginelli: "You don't have to think about the prosecution. They don't know what's in your mind. You are insured for arson. But we are professionals. We know what we use, and its undetectable, believe me."

Reginelli took the stand and testified that on July 5, 1961 he went to an insurance adjuster by the name of Feinstein, located at Fifth and Chestnut Streets, who advanced him $2,000 in check form and for that $2,000 he retained Feinstein to adjust his claim. He then went to the Central Penn National Bank and cashed the $2,000 check. He denied that he ever saw or knew Klayman or Price prior to his arrest, which occurred in 1964. He testified that there was no one with him when he picked up the money. Price took the stand and testified that he never knew Reginelli and was never in his shoe store. He stated that he

was friendly with Norman Prussell and had known Edward Klayman for twenty years. Both appellants denied setting the fire or causing the same to be set.

In rebuttal the Commonwealth called William Frith, a detective lieutenant in the Philadelphia Police Department, who had questioned Reginelli on July 15, 1964. The witness testified that Reginelli had told him during the interrogation that at the time of going to the insurance adjuster and receiving the $2,000 he was with Klayman, Prussell and Price. William Boardman, of the arson squad of the National Board of Fire Underwriters, also testified in rebuttal on behalf of the Commonwealth that at the interrogation Reginelli admitted that he knew Price and admitted being with Prussell, Klayman and Price the day he got the $2,000. At the interrogation, however, Reginelli did deny that he divided the $2,000 with anybody else and stated that he took the money and went by bus to New Jersey shortly after he cashed the check.

Reginelli appeals on the grounds that the evidence was insufficient to sustain the conviction, that the testimony of Edward Klayman should have been stricken by the court below because the witness was incompetent, and that his constitutional rights were violated because at the time of the interrogation he was not advised of his right to counsel or the reason for his arrest or of his right to remain silent.

I.

The test of the sufficiency of the evidence, irrespective of whether it is direct or circumstantial, is whether accepting as true all of the evidence upon which, if believed, the trier of fact could properly have based its verdict, it is sufficient in law to prove beyond a reasonable doubt that the defendant is guilty of the crime charged. Commonwealth v. Whiting, 409 Pa. 492, 187 A. 2d 563 (1963). After a verdict of guilty, we accept as true all of the Commonwealth's evidence upon which, if believed, the jury (or a judge sitting as a jury) could have properly based its

verdict and it is well settled that a jury or a trial court can believe all or a part of or none of a defendant's statements, confessions or testimony, or the testimony of any witness. Commonwealth v. Kirkland, 413 Pa. 48, 195 A. 2d 338 (1963). As was said by Judge WRIGHT in Commonwealth v. McLaughlin, 202 Pa. Superior Ct. 520, 524, 198 A. 2d 419 (1964), a case heard by a judge where a jury trial was waived: "The credibility of the witnesses was for the trial judge, and we must now view the evidence in the light most favorable to the Commonwealth." Viewed in this light, the evidence is sufficient to sustain the conviction.

In an arson case the corpus delicti is established when it is shown that there has been a fire of incendiary origin. Commonwealth v. Nasuti, 385 Pa. 436, 123 A. 2d 408 (1956). The corpus delicti can be proved by circumstantial evidence and expert testimony as to the incendiary origin of the fire is admissible. *Id.* The expert in this case, Lieutenant Short, was well qualified to give an expert opinion both by training, which included in-service training and seminars at Purdue University, and by actual experience. His opinion that the fire was of incendiary origin was based on his finding that there were two separate fires not physically connected, that there was evidence of flammable liquid at both fires, and that there was a torching effect on the front of the store indicating a rapid and severe type of fire. Appellant complains that the court below believed Lieutenant Short's testimony that the fire was of incendiary origin when there were other facts present which tended to show that the fire was accidental. Some of those facts were that there was flammable liquids and materials present in the shoe shop and used in the business of shoe repairing, that a partition separating the two fires did not go to the ceiling and that the fire was gotten under control in approximately thirty minutes. However, there was nothing to show that any of the liquids in the store had been spilled or had caught fire and the facts were simply ones which went to the weight of the Lieutenant's testimony and were for the resolution of the court below

sitting as judge and jury. We are satisfied that Lieutenant Short's testimony was sufficient to support a finding that the fire was of incendiary origin.

II.

Appellant complains that Klayman's testimony should not have been considered by the court because Klayman was incompetent. Since the Act of May 23, 1887, P.L. 158 §1, 19 P.S. §681, all persons, with certain enumerated exceptions not here relevant, are fully competent witnesses in any criminal proceeding unless the contrary can be shown and the burden of proving incompetency is upon the person asserting it. Commonwealth v. Carey, 105 Pa. Superior Ct. 362, 161 A. 410 (1932). Neither Reginelli nor Price has pointed to any rule of law, statutory or otherwise, which would make Klayman incompetent. They point to the fact that Klayman had been convicted of using narcotics, that he was taking a drug, Dolophine, at the time he overheard the damaging conversations, and that at the time he testified he had pending against him a probation violation, a narcotics charge, and three arson charges, none of which had any connection with the burning of Reginelli's store. A witness is not rendered incompetent by a conviction of a crime other than perjury or subornation of perjury, Commonwealth v. Clemmer, 190 Pa. 202, 42 A. 675 (1899); by the use of naroctics, Commonwealth v. Farrell, 319 Pa. 441, 181 A. 217 (1935), Commonwealth v. Aikens, 179 Pa. Superior Ct. 501, 118 A. 2d 205 (1955); or by the fact that criminal charges are pending against him. The weight to be given Klayman's testimony was for the determination of the court below sitting as a jury, who heard all these facts about the witness and observed his demeanor and other traits. Commonwealth v. Farrell, supra. The court below would have been in error had it declared Klayman an incompetent witness and we see no reason to disturb its decision as to the weight given his testimony.

Klayman's testimony as to the visit to the insurance adjuster and the division of the $2,000 along with the conversation accompanying it, together with Reginelli's increase of the fire insurance five weeks before the fire and the fact that a distraint had been issued against him three days before the fire, although all items of circumstantial evidence, convinced the trial court of Reginelli's guilt beyond a reasonable doubt. As the Court said in Commonwealth v. Nasuti, supra at p. 445: "All that is required is that, the evidence being circumstantial, the circumstances proved should be such as reasonably and naturally to justify an inference of the guilt of the accused, and of such volume and quality as to overcome the presumption of innocence and satisfy the jury of the accused's guilt beyond a reasonable doubt." We will not disturb the verdict of the lower court.

III.

Reginelli's complaint that his "constitutional rights were violated" has no merit. He argues that the lower court permitted testimony by two police officers and Mr. Boardman concerning some of his answers given during questioning that took place in the absence of an attorney after he was arrested. First we note that the testimony was offered in rebuttal. Secondly, the statements objected to were not a confession of guilt. They were statements of Reginelli, made to Detective Frith and testified to by Frith, that he was with Klayman, Price and Prussell at the time he went to the insurance adjuster and received the $2,000. In addition it was brought out in this rebuttal testimony that during the questioning Reginelli always denied causing the fire or causing anyone else to set the fire and said that he didn't know anything about how it started. Thirdly, trial counsel did not object to the admission of the rebuttal testimony when it was being offered but later moved to strike it during argument to the court. Failure of Reginelli's counsel to make a timely objection at trial, waiting

instead until he heard all the testimony and then moving to strike, indicates that he might have willingly permitted the testimony since some of it was favorable to his client's case. However, we will not rest our decision on this point for even if we assume that appellant's constitutional right to the assistance of counsel during the accusatory stage of interrogation was violated [1] and that the motion to strike constitutes sufficient objection, it is clear that the testimony was admissible to impeach appellant's credibility after his trial testimony in which he denied that he ever saw or knew Klayman before his arrest in 1964 and testified that no one was with him when he picked up the money.

In Walder v. United States, 347 U. S. 62, 74 S. Ct. 354, 98 L. ed. 503 (1954), the Supreme Court held that the prosecution may make use of unlawfully obtained evidence in testimony to impeach a defendant's credibility after he opens the door on direct examination by making assertions which go beyond the denial of complicity in the crime charged. In Commonwealth v. Wright, 415 Pa. 55, 202 A. 2d 79 (1964), our Supreme Court set forth three conditions under which illegally or unconstitutionally obtained evidence may be used for impeachment purposes. The conditions are: "(1) The defendant must elect to take the stand; (2) His testimony which conflicts with the illegally secured evidence must do more than deny the elements of the crime for which he is being tried; (3) The inadmissible evidence should be received only to the extent that it does not admit the very acts which are essential elements of the crime charged: *Walder v. United States*, supra." Com-

[1] In so assuming, we are not so deciding. The testimony as to whether or when appellant requested counsel and whether or when he was advised of his right to have counsel during the questioning is very unclear and conflicting. In light of the doubt we have as to whether the rule of Commonwealth v. Negri, 419 Pa. 117, 213 A. 2d 670 (1965), must now be applied to this case, tried in May, 1965, (see fn. 2 in Commonwealth v. Vivian, ——Pa. Superior Ct. ——, —, — A. 2d —— (1966), filed today) we will not make our decision hinge on the application or non-application of Negri.

monwealth v. Wright, supra at p. 60. All of these conditions were met in this case.

Reginelli voluntarily took the stand and, much like the defendant in Walder, who testified on direct examination that he had never sold any narcotics to anyone in his life and had never had any narcotics in his possession, other than physician prescribed, Reginelli testified that he had never seen Klayman until he was arrested in 1964, had never seen Price either on or before the date of the visit to the insurance adjuster, and was alone when he picked up the money from the adjuster. As discussed above, the rebuttal testimony at issue was not a confession or admission of any act which was an essential element of the crime of arson. Thus, even assuming that the testimony would not be admissible as part of the Commonwealth's case in chief, it became admissible to impeach when appellant opened the door by his sweeping denials of knowledge of Klayman and Price. As the United States Supreme Court aptly said in Walder, supra at p. 65, "there is hardly justification for letting the defendant resort to perjurious testimony in reliance on the Government's disability to challenge his credibility."

Judgment of sentence affirmed and it is ordered that the appellant appear in the court below at such time as he may be there called and that he be by the court committed until he shall have complied with his sentence or any part thereof which had not been performed at the time the appeal in this case was made a supersedeas,

APPENDIX C

JUDGMENT SOUGHT TO BE REVIEWED

The judgment of the Superior Court of Pennsylvania sought to be reviewed is as follows:

> "Judgment of sentence affirmed and it is ordered that the appellant appear in the court below at such time as he may be there called and by that court committed until he shall have complied with his sentence or any part thereof which had not been performed at the time the appeal in this case was made supersedeas."